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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JAMES LOREN VANDENBURG, Defendant and Appellant.	G040529 (Super. Ct. No. 06WF2307) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, John Conley, Judge. Affirmed.

Richard Power, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Steve Oetting and Theodore M. Cropley, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Substantial evidence supports defendant's conviction for attempted murder. The court did not err in failing to instruct sua sponte on the lesser related crimes of assault and brandishing a firearm. We affirm.

I

FACTS

A jury found defendant James Loren Vandenburg guilty of attempted murder and possession of a firearm by a felon. The jury returned a finding that it is true defendant personally used a firearm, personally discharged a firearm proximately causing great bodily injury and personally inflicted great bodily injury. The court sentenced defendant to seven years, plus 25 years to life in prison.

At trial, the parties stipulated: "Number one, that on August 21, 2006 Kevin Garrett was shot a single time. [¶] Two, that the bullet from that shot that struck Kevin Garrett on August 21, 2006, entered through his right upper arm, traveled through the arm and into the right chest through the diaphragm, the liver, the left kidney and the left colon, causing great bodily injury. [¶] Three — we'll correct that — that Kevin Garrett was immediately hospitalized at UCI Medical Center, underwent several surgeries, and remained in the hospital from August 21, 2006 through September 12, 2006 due to the above mentioned injuries caused by the gunshot. [¶] That Kevin Garrett had to continue taking prescribed pain medication after having been released by the hospital, and had several follow-up appointments to continue tending to his injuries. [¶] That Kevin Garrett on August 21, 2006, suffered great bodily injury in that it was significant and substantial physical injury that was greater than minor or moderate harm within the meaning of Penal Code section[s] 12022.53 [subdivision] (d) and 12022.7 [subdivision] (a), as a result of having been shot on August 21, 2006. [¶] That the bullet found in Kevin Garrett's body was recovered through surgery at UCI Medical Hospital on August 22, 2006, and that such bullet was placed inside a small container and Ziplock bag by UCI medical staff. [¶] That the bullet found in Kevin Garrett's body was

therefore turned over by Denise Tubbs, UCI medical staff, to Garden Grove Police Department Officer Gregg at 2:59 p.m. and that Officer Gregg thereafter properly booked it into evidence."

The victim, Kevin Garrett, testified while "in custody because of several felony convictions" relating to drug sales. He said he and defendant have been friends for about 25 years. On the evening of the shooting, Garrett and defendant argued about "some things that happened couple days before that." Garrett explained: "I was over at the house with Suzie Hobson. We were messing around in the garage and he walked in on us." There was a scuffle between the two and defendant was "a little angry."

While Garrett was inside Suzie Hobson's house, defendant came into the house and the two argued. Defendant had a gun. Garrett said, "If you're going to shoot me, . . . do it now." According to Garrett, defendant "went to put the firearm away. I rushed at him, tried to tackle him, like an idiot." Garrett tried to grab the gun and "the gun went off." Garrett said, "It was an accident."

Garrett was questioned about the police officer who was in the emergency room with him. The officer asked who shot him. Garrett did not tell the officer. At trial, he explained he "just didn't want to." He said he "just didn't want any more problems." When the officer asked Garrett why he wouldn't want to clear his friend by telling the officer the shooting was an accident, Garrett said: "Well, because we would end up in the situation we're in right now. Whether he is innocent or not, you guys are still trying to give him a life sentence here." When he was asked why he waited almost two years to "bring this truth forward," Garrett said he had been in prison and "it's the first time I got to talk to anybody."

Hobson testified that about 8:20 p.m., defendant "broke into my house." After pounding on her door, he climbed into the closed back kitchen window. She said she was painting her daughter's bedroom and she thought she had locked all the windows

because she "was scared of him." Hobson grabbed her keys and left. She said she was crying hysterically and drove around the block.

After she saw defendant leave, Hobson went back to her house and found a note defendant left. In the note, defendant told her he was upset, wanted to talk with her about the relationship and asked her to call him. At that point, Hobson resumed painting. About 30 minutes later, Garrett telephoned that he was sitting in front of her house. He came into her home for no more than 10 minutes and "grab[ed] a beer."

Hobson was walking toward the garage to get her keys when she heard defendant. She saw defendant "coming through the front door, and Kevin stumbling backwards, and they were exchanging words." When she was asked if defendant pushed Garrett, she responded: "Jim was like pushing his way into the house. And Kevin was in his line of path, obviously, and he stumbled backwards." She explained: "He's just coming forward just like charging in like he was angry." She said defendant is "a lot taller" than Garrett.

When the two made their way toward the fireplace, Hobson saw that defendant had a gun in his hand. Defendant "raised it and pointed it towards Kevin." Hobson screamed that defendant should stop. She heard Garrett say "if you're going to shoot me, shoot me already." Next, Garrett "reached from where he [was] standing in front of the fireplace over with one step and put the beer down" and "it went off shortly thereafter." She noted defendant dropped the gun by his side, "put the gun back up" and "shot Kevin."

The following questions were asked by the prosecutor and answered by Hobson:

"Q: Did you try to grab the gun?

"A: No.

"Q: Did Kevin try to grab the gun?

"A: No.

"Q: Did Kevin pull a gun out?

"A: No.

"Q: Did Kevin pull a knife out?

"A: No.

"Q: Did Kevin try to tackle the defendant?

"A: No.

"Q: Did you try to tackle the defendant?

"A: No."

Hobson tried to stop the bleeding. She looked around for her phone to call 911 and saw that defendant was gone.

II

DISCUSSION

Sufficiency of Evidence

Defendant contends there is insufficient evidence because the "theory relied on by the people [is] inherently incredible, inherently improbable, and physically impossible."

In addressing challenges to the sufficiency of evidence, "the reviewing court must examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence — evidence that is reasonable, credible and of solid value — such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] The appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citations.] The same standard applies when the conviction rests primarily on circumstantial evidence. [Citation.] Although it is the jury's duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt. [Citation.] '"If

the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. [Citation.]"' [Citation.]" (*People v. Kraft* (2000) 23 Cal.4th 978, 1053-1054.)

To warrant the rejection by a reviewing court of statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true, or it must be so clearly false and unbelievable that reasonable minds would not differ about it. (*People v. Jenkins* (1965) 231 Cal.App.3d 928, 931.) "Although the appellate court must ensure the evidence is reasonable in nature, credible, and of solid value [citation], it must be ever cognizant that '"it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends . . . ."' [Citations.]" (*People v. Barnes* (1986) 42 Cal.3d 284, 303.)

Here, Hobson testified defendant is "a lot" taller than Garrett, and the stipulation describes a downward trajectory of the bullet. She said Garrett was in the process of stepping and reaching down to set his beer on a table when he was shot. Garrett gave one version of the events, and Hobson another. Obviously the jury believed Hobson; there is nothing inherently improbable about her testimony.

Sua Sponte Duty to Instruct

Defendant next contends the trial court erred by failing to instruct the jury sua sponte on assault with a firearm and brandishing a weapon. Within this argument, defendant also argues "competent counsel would request an instruction on the far less serious charges of assault with a firearm and/or brandishing in preference to a possible conviction of attempted murder with discharge of a firearm causing great bodily injury." We assume he concedes he did not request these instructions. The Attorney General says

the trial court had no duty to give the instructions because they are not lesser included offenses of attempted murder.

"Trial courts only have a sua sponte duty to instruct on 'the general principles of law relevant to and governing the case.' [Citation.] 'That obligation includes instructions on all of the elements of a charged offense' [citation], and on recognized 'defenses . . . and on the relationship of these defenses to the elements of the charged offense.' [Citations.]" (*People v. Rubalcava* (2000) 23 Cal.4th 322, 333-334.) A trial court must instruct on lesser included offenses "whenever there is substantial evidence raising a question as to whether all of the elements of the charged offense are present. [Citations.] 'Substantial evidence is evidence sufficient to "deserve consideration by the jury," that is, evidence that a reasonable jury could find persuasive.' [Citation.]" (*People v. Lewis* (2001) 25 Cal.4th 610, 645.)

"To determine whether a lesser offense is necessarily included in a greater charged offense, one of two tests must be met. [Citation.] The 'elements' test is satisfied if the statutory elements of the greater offense include all the elements of the lesser offense so that the greater offense cannot be committed without committing the lesser offense. [Citation.] The 'accusatory pleading' test is satisfied if 'the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater [offense] cannot be committed without also committing the lesser [offense].' [Citation.]" (*People v. Cook* (2001) 91 Cal.App.4th 910, 918.)

The elements of attempted murder are an intent to kill and one direct but ineffective step toward killing another person. (Pen. Code, §§ 664, 187.) A person can commit an attempted murder without either committing an assault or brandishing a weapon. (See, e.g., *People v. Young* (1981) 120 Cal.App.3d 683, 690; *People v. Benjamin* (1975) 52 Cal.App.3d 63, 71.)

"We have held that a trial court has no duty to instruct on an uncharged lesser related offense when requested to do so by the defendant [citation] and, therefore,

it is clear that the trial court did not err in failing sua sponte to so instruct on that point." (*People v. Schmeck* (2005) 37 Cal.4th 240, 291-292.) Accordingly, the court did not err in not instructing on crimes which were not necessarily included in the charged offense.

Nor can we conclude defendant's counsel provided ineffective assistance. "In order to demonstrate ineffective assistance, a defendant must first show counsel's performance was deficient because the representation fell below an objective standard of reasonableness under prevailing professional norms. [Citation] Second, he must show prejudice flowing from counsel's performance or lack thereof. Prejudice is shown when there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. [Citation.]" (*People v. Williams* (1997) 16 Cal.4th 153, 214-215.) If the record on appeal sheds no light on why counsel acted or failed to act, "'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation,'" these cases are affirmed on appeal. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.)

Under the circumstances in the record before us, we cannot conclude there could be no satisfactory explanation or that the defense counsel's performance was deficient. While the record does not disclose any explanation why defense counsel did not request lesser instructions, satisfactory explanations could be that counsel made a tactical decision or that defendant was willing to "roll the dice" and take the chance on a complete acquittal since he produced a witness, the victim himself, who said the shooting was an accident. In any event, counsel's reasoning is not part of the record on appeal, so we cannot determine whether or not there was deficient performance.

III

DISPOSITION

The judgment is affirmed.

MOORE, J.

WE CONCUR:

SILLS, P. J.

BEDSWORTH, J.